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No. 90-1078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD LYMAN, Jr., MATSUO TAKABUKI, MYRON B. THOMPSON, WILLIAM S. RICHARDSON, HENRY H. PETERS, Jr.,
Petitioners,
vs.
CITY AND COUNTY OF HONOLULU,
A Municipal Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. THERE IS NO REAL DISPUTE OVER THE FACT THAT RESPONDENT ENGAGED IN PROSCRIBED CONDUCT.

Respondent (Honolulu) disregards those parts of the record that form the core of Petitioners' case. Honolulu flouts the rule of *United States v. Diebold*, 369 U.S. 654, 655 (1962) that where the appeal is from a directed verdict the facts must be viewed favorably to the Petitioner. Instead, Honolulu favors itself by construing the record and excises from its presentation facts that are unfavorable to it. So what if Honolulu's Mayor and planning officials engaged in open extortion? — says Honolulu (Br. Opp., pp. 10-11) — they did not do so "officially." So what if Bishop Estate sought judicial relief for this constitutional violation? — says Honolulu — it did not do so "separately." (Br. Opp., p. 15).[1]

All this demonstrates Honolulu's preoccupation with legal quiddities that are alien to constitutional adjudication. As this Court put it in *United States v. Dickinson*, 331 U.S. 745, 748 (1946): ". . . The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' — when they are born, whether they proliferate, and when they die."

Honolulu tries to divert the Court's attention from extensive (and on this record uncontroverted) evidence of a lengthy municipal course of conduct spanning two mayoral administrations, whereby at every level of municipal governance it openly and unblushingly communicated to

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[1] That approach to the depiction of facts thus echoes what happened below. Please note that in the Court of Appeals, as here, Honolulu (see Br. Opp., pp. 4-5, fn. 9) simply asserted that Petitioners' presentation was inaccurate, but never explained why or how, pleading "page limitation on the City's brief" as an excuse for its supposed inability to present the Court below with its version of a proper statement of facts. Now Honolulu has presented this Court with 26 densely printed pages, but is still unable to find enough space to discuss any evidence of the extortionate municipal demands that are the core of Bishop Estate's *Nollan* claim. How odd.

Petitioners that no approvals for any reasonable uses of land in the Hawaii Kai area would be granted unless Bishop Estate first "donated" some 80 acres of prime beach land concededly worth tens of millions of dollars. Similar demands, as Duran testified, were *always* made by Honolulu — they were municipal policy. There is absolutely nothing in the cases cited by Honolulu at Br. Opp., p. 11, n. 25, that is in any way inconsistent with Bishop Estate's position. In fact, *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), makes clear that municipal policy may be discerned from a single statement of an official (see *Id.* at 123). Here, *a fortiori*, the Honolulu policy of extortion complained of came from two successive mayors as well as other city officials charged with administering the very land-use matters that are the subject of this lawsuit. If these people do not make Honolulu policy in such matters, then who does?

Confronted with that reality, Honolulu now sweeps crucial evidence under a rhetorical rug with the dismissive assertion that all those openly extortionate demands (see Pet. Cert., pp. 14-15), were not "official." Stripped to its essence, Honolulu's argument is that unless city officials who set out on a course of constitutional violation, do so by some sort of "official" resolution or some such solemn formality, the city governed by them can *de facto* violate the Constitution to its heart's content with impunity, and there is no need to bother this Court with what it actually did. But that is not how these matters are judged; as Justice Stewart put it in *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring): "But the Constitution measures a taking of property not by what a State says, or what it intends, but by what it *does*." (Emphasis in the original.)

Moreover, Honolulu's argument is self-contradictory. If it means to assert that evidence of these extortionate demands should be disregarded because they were not "official" (see Br. Opp., pp. 10-11), doesn't that destroy its simultaneous argument that Petitioners' claim arising out of those demands was not properly raised below? Was there, or

wasn't there evidence of attempted municipal extortion? Plainly, there was. Honolulu's argument thus reduces itself to the absurdity that yes, there was on this record uncontroverted evidence of municipal extortion, but the extortion wasn't "official" and Bishop Estate's claim based thereon wasn't "separately" stated.[2] Thus, goes Honolulu's argument, the federal judiciary is precluded by these word games from granting relief for these plain constitutional violations.

Honolulu's argument also fails on its own premise. Honolulu, like any governmental or corporate entity, can only act through its officials. Thus, its argument reduces itself to the absurdity that unless those who govern such an entity "officially" confess by putting their unlawful purpose on the record, they and the entity governed by them may freely violate the Constitution with impunity. This Court has already recognized that municipal officials cannot be expected thus to flaunt their unlawful conduct, and in *Village of Arlington Heights v. Metro. Housing Dev. Co.*, 429 U.S. 252, 267 (1977) has opted for a realistic approach that calls for the drawing of inferences from suspicious municipal conduct (precisely the sort of thing that should have been heard and decided by the jury). In short, Honolulu willfully confuses official activity with the formalities that may or may not accompany it. It ignores the self-evident truism that constitutional rights can be violated "unofficially" as well as "officially." In Justice Frankfurter's noted words in *Lane v. Wilson*, 307 U.S. 268, 275 (1939), the Constitution guards against sophisticated as well as simple-minded state contrivances seeking to defeat rights protected by it.

This record is clear that Honolulu did in fact engage in a pattern of extortionate demands, and that this was its consistent policy (*i.e.*, Honolulu "always" tried to extort "goodies" in exchange for permits; see Pet. Cert., pp. 14, 15, n. 20). Its own officials unequivocally so testified (see testimony quoted at Pet. Cert., pp. 13-14). Honolulu

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2 "Separately" from what, one might ask?

prevailed below on this point not because its conduct was not "official" but supposedly because the *Nollan* claim was not "separately" raised below.[3] One is left to wonder what all that evidence (whose accuracy for once is not impugned by Honolulu)[4] is doing in the record if — according to it — the matter was not even raised.

II. RESPONDENT'S PRESENTATION IS SELECTIVE AND SELF-CONTRADICTORY.

Honolulu has a great deal to say and it says it forcefully. Unfortunately, missing from this bluster is a candid discussion of two fundamental factors.

A. Respondent's Presentation Defies *Agins v. City of Tiburon*, And Confuses Legitimate Police Power Regulation With Predatory Constitutional Violations.

Even on its own premise, Honolulu fails to address the most fundamental shortcoming of the Opinion below; namely, where the charge is that the municipal .conduct in question is illegitimate (*i.e.*, where its purpose is not to regulate in furtherance of public health, safety, welfare and

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[3] Just what the legal significance of the word "separately" is supposed to be, and why Honolulu considers it so important as to italicize it in its presentation (Br. Opp., p. 15) is a mystery. Honolulu certainly offers no explanation. See *post*, pp. 7-8.

[4] In may not be inappropriate to note here, if only to provide this Court with a glimpse of how aggressive advocacy can distort the way in which things are presented to it, that following oral argument in the court below, the presiding Circuit Judge went out of his way in open court to express the Court's compliments to counsel for an extraordinarily high quality of presentation of the case at bench. So did counsel for Honolulu, to Bishop Estate's counsel — privately, of course. Now this Court is being told that Bishop Estate's presentation has been consistently deficient in every conceivable way. There has to be a moral in that, and we are certain the Court will discern it.

morals, but to "soften up" a land owner as a prelude to contemplated municipal acquisition of his land) is such municipal conduct reviewable by a "good faith" standard, or *solely* by a "denial of all economic use" standard? In *Agins v. City of Tiburon*, 447 U.S. 255, 261, n. 9 (1980), this Court went out of its way to make clear that where precondemnation blight is in issue — as opposed to proper police power regulation — liability *vel non* turns on presence of "good faith planning."

Honolulu (Br. Opp., pp. 12-13) thus advances the notion that even where government conduct does *not* advance a legitimate public purpose, it can nonetheless be indulged in with impunity unless it is totally destructive of the victim's rights. That is neither good sense nor good law. A substantial impairment of property rights is sufficient to establish liability where the government lacks the defense of exercising of the police power. See Amicus Curiae Brief of Pacific Legal Foundation, pp. 9-12, and the authorities collected there; also see Pet. Cert., pp. 23-24, n. 27.

Even apart from precondemnation blight, such liability also follows from this Court's other teaching in *Agins*, that a taking results where the ostensibly regulatory municipal act "does not substantially advance legitimate state interests" (447 U.S. at 260).[5] That is the view of virtually every American court that has considered the issue; *i.e.*, where the purpose of the ostensible regulation is to facilitate land acquisition, a substantial impairment of private property rights is sufficient to establish liability (see cases collected at Pet. Cert., pp. 23-24, n. 27, particularly *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266 (Tex. Civ. App. 1975) for its excellent analysis of the limits of the police

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[5] It is basic that municipal activity overtly calculated to frustrate the Just Compensation Clause of the Fifth Amendment, by depressing values of land sought to be acquired is illegitimate. *See United States v. Reynolds*, 397 U.S. 14, 16 (1970), *United States v. Virginia Electric Co.*, 365 U.S. 624, 625 (1961), *cf. Almota Farmers Elevator & Whse. Co. v. United States*, 409 U.S. 470, 480 (1973) (Powell and Douglas, J.J., concurring).

power in the context of governmental precondemnation activities; *i.e.*, where the government engages in precondemnation blighting of land it means to acquire, it is no longer entitled to judicial deference because then it is no longer governing but placing its thumb on the scale for its own advantage).

Far more important at this time is the fact that — as shown by numerous cases involving such governmental misconduct (Pet. Cert., pp. 23-24, n. 27) — this illegitimate practice is common. Yet, in spite of the state and lower federal courts' condemnation of it, it persists. The opinion below, however, without analysis departs from the prevailing law and sets the stage for needless confusion.[6]

B. The *Nollan* Municipal Extortion Issue Was Duly Pled And Tried Below, As Is Apparent From The District Court's Opinion And The Quoted Record.

On the issue of whether the *Nollan* municipal extortion issue was raised below, Honolulu does not deny that it was,[7] but merely plays word games by asserting that it was not "separately" raised — whatever that means. One should not have to cite for this Court the hornbook proposition that federal rules do not contemplate any such thing; no separate statements of legal theories or causes of action are required. Pleading a "short and plain statement of the claim" is all that

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[6] When the terse per curium opinion below first came down, it was unpublished. But once this astonishing holding on the issue of precondemnation blight was read by government lawyers they (particularly the California Attorney General) implored the Court of Appeals to publish its opinion, so that they would have something favorable to cite on this point on which the great weight of authority has rejected their arguments. On this point, the opinion below is simply a gratuitious generator of conflict in the law, and of confusion.

[7] Nor can it. The District Court opinion below (see 649 F. Supp. 929-930) expressly notes that Bishop Estate did raise an improper extortion claim below.

is needed. *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957). For a concise statement of pertinent rules (collecting authorities ranging from this Court's decisions to leading treatises) *see Patriarca v. F.B.I.*, 639 F. Supp. 1193, 1198 [4] (D. R.I. 1986). Nor are any "separate" presentations required at trial. At no time did Honolulu assert at trial that some sort of "separate" trial of plaintiffs' legal theories or "causes of action" was required. In any event, such things are matters of procedure that at most entail convenience of presentation (*Conley v. Gibson, supra; O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 392-393, including n. 6 (1949)). It is simply shocking for deserving litigants to be told years after the fact that substantive relief on their duly pled and tried claim is to be denied in spite of clear evidence favoring relief, merely because they supposedly did not raise a theory of recovery "separately."

The trial court's opinion itself makes clear (see 649 F. Supp. at 929-930) that Bishop Estate did raise a *Nollan* claim (see Pet. Cert., p. 13, n. 19). Once raised, that claim was properly before the trial court; it did not vanish into thin air.[8] As for Honolulu's citation to the record (Br. Opp., pp. 16, 17) in asserted support of the proposition that Bishop Estate supposedly disclaimed reliance on *Nollan*, there are two quick answers: first, the cited record in no way supports a waiver of the *Nollan* issue, and second, it is so crudely wrenched out of context as to leave one gasping in disbelief. Suffice it to say that only one page earlier in the record (RT 36-56) plaintiffs' trial counsel was relying on *Nollan* explicitly. Indeed, he argued: "Certainly, I disagree with [Honolulu counsel's] point that this is only a regulatory case. This certainly is not. It's true that the City had a goal here, it's very clear that park was the goal, and I believe all of the 1980 series of regulations really were implementing that goal to deny that resort, to acquire park." (RT 36-68 through

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[8] What Honolulu fails to mention is that Bishop Estate's *Nollan* type of claim was also raised by the pretrial statement, and thus undeniably became an issue for trial.

36-69). Counsel went on (at RT 36-82) to stress *Nollan's* language that ". . . 'a public entity should not leverage the use of police power either to exact a public interest or to further a condemnation acquisition' . . ."

More importantly, how the trial court could acknowledge this claim and then somehow dispose of the entire case by summary judgment and directed verdict without mentioning it, is a mystery. How Honolulu can argue in the face of this record that the *Nollan* claim was not properly raised is another mystery. No doubt that accounts for Honolulu's investing the phrase "separate claim" (Br. Opp., p. 15) with positively mystical, albeit legally unsupported [and unsupportable] significance. But the issue was before the trial court and much evidence was taken on it. The trial court itself elicited testimony (see Pet. Cert., p. 15, n. 20) that in defiance of the *Nollan* rule Honolulu always tries to obtain an exaction [irrespective of any required nexus].

III. A WORD ON POLICY.

In a way, what is most unfortunate about Honolulu's brief is its tone. It is thus appropriate to observe that Petitioners are not some sort of enemy. They are law-abiding Americans within the purview of the Bill of Rights. Their "transgression" is said to be their desire to put their own property to legitimate, constructive uses subject only to *reasonable* regulation. That to do so is their constitutional right is what this Court has taught us in *Nollan*. Avowed municipal attempts at extortion — whether "unofficial" or "official" — are simply antithetical to the Constitution.

In an era in which constitutional rights of society's concededly unworthy members receive sensitive review and punctilious protection by the judiciary, there is something profoundly troubling about a case in which perfectly lawful activities of a charitable trust are *de facto* treated as if they were the antisocial ones. This is a form of moral inversion that, with all due respect, the Court should not tolerate.

As this Court put it in *Speiser v. Randall*, 357 U.S. 513, 520 (1958): "The procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." The "procedure" whereby Bishop Estate's *Nollan* claim was adjudicated below fails that test. It even fails to meet the rudiments of due process. The substantive rule of liability for predatory blighting of private property, articulated by the Court below, is at odds with prevailing American law. The *de facto* endorsement of Honolulu's word game that in the federal courts legal theories must somehow be "separately" pursued is worse.

What is at stake here transcends the constitutional rights of the Petitioners. The law of takings remains in chaos; *see* Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy,"* 44 Ark. L. Rev. 65, 77-79 (1991), collecting numerous expressions by renowned authorities virtually vying with one another to come up with a suitably pejorative characterization of the state of the law; Peterson, *The Takings Clause: In Search of Underlying Principles, Part I - A Critique of Current Takings Clause Doctrine*, 77 Cal. L. Rev. 1299 (1990), concluding that on the present state of the law there is no discernible doctrinal basis on which to determine when a harsh regulation is a taking.

In the end, law-abiding American property owners have constitutional rights too. They have a just claim to a fair share of this Court's attention, at least to the minimal extent of being told (a) what are the elements of a nonphysical taking, and (b) exactly what are the procedural preconditions to pursuit of judicial relief.[9] The present *ad hoc*, case-by-

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[9] The case at bench is a paradigm. Bishop Estate — counting all the proposals for development, formal as well as informal — says that there were some half-dozen attempts to develop the Queen's Beach area. Honolulu indignantly replies that there were "only" two (but see 649 F. Supp. at 941, n. 19, for the trial court's version of these efforts to develop the subject property — that certainly looks like more than two). But whichever of these

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case approach simply isn't working; this Court has not decided a sufficient number of such cases on the merits to provide lower courts and litigants with effective guidance. The present situation needlessly burdens parties and the already congested lower courts, and its predictive attributes are so poor as to give the process a greater resemblance to an elaborate lottery than to a judicial process conducted under a rule of law.

CONCLUSION

Bishop Estate urges that the instant Petition presents the Court with vexing problems of nationwide importance that require addressing, as well as a massive miscarriage of justice.

Bishop Estate prays that the Writ of Certiorari issue.

Respectfully submitted,

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(ftn. continued)
competing premises one accepts, isn't two enough? *How many times must a landowner beat its head against a brick wall in a futile effort to gain municipal approval to do no more than what this Court characterized in Nollan as a constitutionally protected right? How many times must an American citizen go hat-in-hand to municipal officials to implore them to grant him permission to use his own land for a lawful and constructive purpose? How many times must one do so, even as the municipal officials are announcing to the world by every means of communication available, that they have not the slightest intention of allowing any use of the subject property, except on the unconstitutional, extortionate condition that the enormously valuable 80 acres comprising Queen's Beach be first given to the city as an extralegal tribute?* It is rather difficult to accept the notion that the Court intended to unleash this sort of predatory municipal conduct when it formulated its ripeness rules in inverse condemnation cases. It is even more difficult to countenance the thought that this Court means to acquiesce in such cynical municipal games as tolerable under the Constitution.